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82-448

No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

CREATIVE ENVIRONMENTS, INC., ET AL.,
PETITIONERS,

v.

ROBERT R. ESTABROOK, ET AL.,
RESPONDENTS.

On Writ Of Certiorari To The United States Court of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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I

QUESTIONS PRESENTED FOR REVIEW

1. Under what circumstances do repeated intentional violations of state law rise to the level of a constitutional violation for which there is a cause of action under 28 U.S.C. § 1983?

2. Does the availability of a state remedy cure an intentional deprivation of property without due process of law?

3. What analysis must be undertaken to determine whether a state remedy is adequate to cure a prior deprivation of property without due process?

4. Where a developer alleges that town approval of a subdivision plan was denied for subjective political and social reasons, is it required to "prove" that such motives were the "sole or major" reasons for disapproval in order to survive a motion for summary judgment?

5. Do a developer and an intended homeowner in a subdivision for which a plan has been submitted to local authorities for approval have standing to raise the First Amendment rights of the homeowners of the planned subdivision?

PARTIES

Petitioners are Creative Environments, Inc., a Massachusetts corporation and Wayne E. Barber, an individual who is president of the corporation. Respondents include appointed and elected officials of the Town of Bolton, Massachusetts[1], Environmental Research Technology, Inc. and its employee Scott McCandless, and the Town of Bolton, which was added as a party by amendment subsequent to the original entry of the action.

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[1] Robert R. Estabrook, Robert P. Fischer, Gordon E. Slater, Ronald G. Kelley, Berneda A. Serfass, Pierino A. Bonazzoli, Robert N. Mechlin, Francis G. Mentzer, Jr., Waldo G. Henry, Arthur S. Hill, Robert J. Held, Warren K. Colby, Wayne D. Wentzel, Jr., Richard W. Sullivan, Walter H. Phillips, Eric F. Salmela, and Bonnie Potter. Original defendants Thomas Murphy and Robert G. Horton are now deceased.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Creative Environments, Inc. and Wayne E. Barber (together collectively referred to herein as "CEI" or "Petitioners") respectfully pray that a writ of certiorari issue to review the opinion, order and judgment of the United States Court of Appeals for the First Circuit in this case.

Opinions Below

The opinion of the First Circuit Court of Appeals is not yet reported. It is reproduced herein as Appendix A. The opinion of the District Court allowing the motions for summary judgment filed by all of the Respondents except the Town of Bolton is officially reported at 491 F. Supp. 547 (D.C. Mass. 1980). The opinion of the District Court allowing the Town's separately filed motion for summary judgment is unreported and is reproduced herein as Appendix B.

Jurisdiction

The decision of the United States Court of Appeals for the First Circuit was rendered on May 6, 1982. Petition for rehearing was denied on June 15, 1982. The jurisdiction of this Court rests on 28 U.S.C. § 1254.

Constitutional and Statutory Provisions Involved

U.S. CONST. AMEND. XIV, § 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MASS. GEN. LAWS ANN., CH. 41, § 81M.

§ 81M. Legislative Statement of Purpose.

The subdivision control law has been enacted for the purpose of protecting the safety, convenience and welfare of the inhabitants of the cities and towns in which it is, or may hereafter be, put in effect by regulating the laying out and construction of ways in subdivisions providing access to the several lots therein, but which have not become public ways, and ensuring sanitary conditions in subdivisions and in proper cases parks and open areas. The powers of a planning board and of a board of appeal under the subdivision control law shall be exercised with due regard for the provision of adequate access to all of the lots in a subdivision by ways that will be safe and convenient for travel; for lessening congestion in such ways and in the adjacent public ways; for reducing danger to life and limb in the operation of motor vehicles; for securing safety in the case of fire, flood, panic and other emergencies; for insuring compliance with the applicable zoning ordinances or by-laws; for securing adequate provision for water, sewerage, drainage, underground utility services, fire, police, and other similar municipal equipment, and street lighting and other requirements where necessary in a subdivision; and for coordinating the ways in a subdivision with each other and with the public ways in the city or town in which it is located and with the ways in neighboring subdivisions. It is the intent of the subdivision control law that any subdivision plan filed with the planning board shall receive the approval of such board if said plan conforms to the recommendation of the board of health and to the reasonable rules and regulations of the planning board pertaining to subdivisions of land; provided, however, that such board may, when appropriate, waive, as provided for in section eighty-one R, such portions of the rules and regulations as is deemed advisable. (1953, 674; 1957, 285; 1969, 884, § 2.)

MASS. GEN. LAWS ANN., ch. 41, § 81BB

§ 81BB. Same Subject; Appeals, Costs, etc.

Any person, whether or not a party to the proceedings, aggrieved by a decision of a board of appeals under section eighty-one Y, or by any decision of a planning board concerning a plan of a subdivision, or by the failure of such a board to take final action concerning such a plan within the required time, or any municipal officer or board, may appeal to the superior court sitting in equity for the county in which the land concerned is situated; provided, that such appeal is entered within twenty days after such decision has been recorded in the office of the city of town clerk or within twenty days after the expiration of the required time as aforesaid, as the case may be, and notice of such appeal is given to such city or town clerk so as to be received within such twenty days. The court shall hear all pertinent evidence and determine the facts, and upon the facts so determined, shall annul such decision if found to exceed the authority of such board, or make such other decree as justice and equity may require. The foregoing remedy shall be exclusive, but the parties shall have the rights of appeal and exceptions as in other equity cases.

A city or town may provide any municipal officer or board with legal counsel for appealing, as provided in this section, a decision of a board of appeals or a planning board and for taking such other subsequent action as parties in other equity cases are permitted to take.

Costs shall not be allowed against the planning board or board of appeals unless it shall appear that such board acted with gross negligence or in bad faith.

All issues in any proceeding under this section may be advanced for speedy trial over other civil actions and proceedings. (1936, 211, § 4; 1947, 340, § 4; 1953, 674, § 7; 1955, 348; 1957, 199, § 2.)

RULES AND REGULATIONS GOVERNING THE SUBDIVISION OF LAND, BOLTON MASSACHUSETTS

3.3 Definitive Plan

3.3.3.1 Submission

Any person who submits a definitive plan of a subdivision to the Planning Board for approval shall file with the Board the following:

. . .

3.3.1.28

Environmental and Financial Impact Studies endorsed by a Professional Planning Engineer which demonstrates that all available alternatives have been explored and evidence is provided that the plans submitted represent the best interest of the Town.

Statement of the Case

Petitioner Creative Environments, Inc. became the owner in 1973 of a 183 acre parcel of land in the Town of Bolton ("Town") known as Appleton Ridge. Seeking subdivision approval, CEI filed a preliminary plan with the Town on December 4, 1973, in accordance with Massachusetts Law.

The plan proposed an 84 unit housing subdivision for Appleton Ridge. The homes were to be arranged in four-home "clusters", each cluster to be surrounded by a large area of open wooded space and sharing common services. The cluster concept was at the heart of the Appleton Ridge subdivision plan.

To satisfy the Town zoning requirement that individual single family homes be built on separate lots of at least 1.5 acres, CEI drew the lot lines around each home in an unconventional, irregular shape. This complied with the Town zoning requirements which had no express sideline specifications over and above the 1.5 acre requirement. CEI also

planned other common facilities for use by the entire subdivision; all common facilities were to be managed by the subdivision's homeowners association. Each homeowner would own an interest in common facilities and automatically become a member of the homeowners association.

The proposed subdivision would, by its size alone, have a substantial impact on the Town. According to census data, Bolton had a 1980 population of only 2,530. Moreover, the mandatory homeowners association presented at least the possibility of the creation of a new, cohesive political force in the Town. Whether or not this would have been the case, the record below presents sufficient evidence[3] to support a finding that the social and political impact of the subdivision on the Town was a motivating factor in the minds of those Town officials and independent consultants who took part in the consideration, and ultimate denial, of the Appleton Ridge subdivision plan.

The Town Planning Board ("Board") denied approval of the preliminary plan, for reasons which included a statement that the irregular lot lines were "not in compliance with the intent of the town by-laws". As was its right, CEI proceeded to file a definitive subdivision plan which the Board was required to approve so long as it complied with the Town zoning by-laws and the Board's own reasonable rules and regulations. Mass. Gen. Laws Ann. ch. 41, § 81M. Board Regulation 3.3.1.28, in

[3] The evidence included statements by a number of the respondents. For example, at a meeting of the Town Planning Board on March 18, 1974, Board member Murphy stated "that the organization of homeowners would be such that they could control the Town Meeting and that he was terribly concerned about the effect of a small town government with such a situation." A topic of discussion at one of the Board's secret meetings on September 18, 1974, only eight days prior to disapproval of CEI's plan, was the "social impact on the Town". Moreover, CEI presented evidence that the purported grounds for disapproval on September 26, 1974 were not the real bases for the decision. See discussion of September 26, 1974 written decision below.

existence at the time CEI filed (and continuing in effect throughout the time of the matters discussed herein) required developers to file with the Board, as a condition for approval, an environmental and financial impact study demonstrating that "the plans submitted represent the best interest of the Town." Nothing in the regulation provides any criteria or factors to be considered in determining what is in the best interest of the town. In an attempt to comply with the regulation, CEI submitted a 33 page study.

Although one public hearing and several meetings with CEI were held, the Board also met on a number of other occasions in secret, without notifying the public (or CEI) and without complying with state law provisions for the holding of executive sessions. These "unofficial" meetings included at least one meeting in which the Board invited all "major town boards and officials...to bring with them comments, questions, and information pertinent to CEI's definitive plan." Although there are no minutes (a further violation of state law) and few notes of these meetings, those that exist indicate that Regulation 3.3.1.28 and the social and political impact of the subdivision on the Town were frequent topics of discussion.

The Board hired consultants to evaluate CEI's proposal. Environmental Research Technology, Inc. ("ERT") was retained through the intercession of Scott McCandless ("McCandless") (an active Town resident who opposed the Appleton Ridge plan) to evaluate the environmental and financial impact statement submitted under Regulation 3.3.1.28. Boston Survey Consultants (BSC), a corporation providing professional engineering services, was retained to evaluate the plan itself. Both consultants rendered reports to the Board which were used (as discussed below) in preparing its final written decision denying approval for the subdivision plan. Despite repeated requests, CEI was denied copies of the reports. Nor

were the contents of the reports revealed to CEI, at public hearing or otherwise, prior to the Board's disapproval of the plan.[3]

The Board voted to disapprove the definitive plan on September 25, 1974. Thereafter, the Board received Town counsel Arthur Hill's written opinion that Regulation 3.3.1.28 could not legally be used as grounds for denial of the subdivision plan. In its written decision dated the following day, September 26, the Board listed verbatim, as grounds for disapproval, seven items that BSC in its report suggested as "minor conditions" which they recommended be attached to approval of the plan.[4] At the close of its decision, despite Town counsel's opinion, the Board added in a separate paragraph that it considered CEI's environmental impact study, submitted under Regulation 3.3.1.28, "unacceptable". Although the Board voted not to cite Regulation 3.3.1.28 as an express ground for disapproval, it did not otherwise explain the relevance of this last paragraph to its decision.[5]

In order to protect its right to seek review of the decision, CEI filed an appeal under Mass. Gen. Laws Ann. ch. 41, § 81BB. While the appeal was pending, the parties continued their discussions which soon focused, not on the reasons expressly given for denial of the plan (these "minor" problems

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[3] Indeed, both reports are dated after the date of the only public hearing; ERT was not even retained until September 12, 1974, four days after the public hearing.

[4] CEI points to the Board's refusal to provide the BSC report (thereby preventing CEI from curing the "minor" problems noted therein), the verbatim quoting from the BSC report (evidencing the Board's lack of input and interest in these technical items) and the Board's failure to indicate the particular Town regulation which it claims was violated in each instance as required by state law as further evidence that the items listed were only a pretext, not the Board's real reasons for denying approval.

[5] The unexplained inclusion of this statement is yet further evidence that Town officials' subjective fears were factors underlying their decision, having been considered under the guise of Regulation 3.3.1.28.

having been quickly resolved[8]) but on the newly raised issue of a grant of open space to the Town. During the spring and summer prior to disapproval, several meetings took place between Robert Held, chairman of the Conservation Commission of the Town, and CEI. Held demanded, as a condition for Conservation Commission approval, that CEI grant a substantial amount of land in the subdivision to the Town free of charge, in perpetuity. CEI agreed to make such a grant, provided its definitive plan was approved substantially as submitted, with the waivers requested therein.

On December 5, 1975, as part of the post-decision discussions, CEI submitted a revised plan which reflected the open-space agreement with the Conservation Commission. On January 30, 1975, the Board voted to conditionally accept the December 5 plan, adding several new conditions, and withholding a number of requested waivers. As a result, CEI withdrew its offer to grant the open space in perpetuity, and instead reduced the term of the grant to three years, the maximum term which the Board could unilaterally demand under state law. Mass. Gen. Laws Ann. ch. 41, § 81Q.

On March 20, 1975, the Board again conditionally approved the CEI plan, adding still further conditions including, though not limited to, the grant in perpetuity of open space that CEI had previously withdrawn. CEI immediately brought the March 20 approval conditions to the attention of the state court. All other stated conditions and the seven express reasons for the September 26, 1974 decision having been resolved by the parties, the trial focused upon the issue of whether the Board could, under state law, condition approval of the plan on the granting of open space in perpetuity. The state court remanded the case to the Town Board, ordering

[8] Although as late as January 1975, Board member Kelley asserted that applicants were still required to show that their plans represented the best interest of the Town under Regulation 3.3.1.28 as a condition for approval. This and later efforts of the Board show that the Town had not abandoned Regulation 3.3.1.28 as a vehicle for defeating the Appleton Ridge plan.

CEI to submit a new open space plan and ordering the Board to take definitive action on the plan. In compliance, CEI filed a plan with the Board showing the open space it proposed to grant to the Town.

Thereafter, the Board met twice in "executive session", resulting in a June 16, 1975 resolution. This resolution was passed without any public hearing, without prior notice to CEI, and without providing CEI an opportunity to be heard on the issue. It totally ignored the new open space plan already filed by CEI and instead required CEI to submit an entirely new subdivision plan, forcing it to start the entire subdivision approval process over again from the beginning, and thereby subjecting CEI to all Town by-laws and regulations enacted after the filing of CEI's original plan. Not surprisingly, the Town had, in the interim, enacted a by-law which outlawed the irregular lot lines used by CEI in its plan, and thereby defeated the "cluster" concept which was at the heart of the Appleton Ridge subdivision plan. Soon thereafter, the Board raised the filing fee, increasing the amount CEI would have to pay from $75.00 to $19,000.00. Of that, approximately $13,000.00 was to be used to finance the review of studies submitted under Regulation 3.3.1.28. Presumably, CEI would have to once again attempt to comply with the regulation.

Through this one stroke, the Town has successfully defeated CEI. It did so in a manner that was arguably not appealable under state law, since it was not a decision on a particular subdivision plan. Indeed, when CEI attempted to bring the issue to the attention of the court, it was informed that the court had no longer retained jurisdiction of the matter. On the other hand, had it elected to file a new subdivision plan and start the whole subdivision approval process over again, CEI would automatically have lost its protection from the newly enacted by-laws.

CEI thereupon filed an action in the United States District Court for the District of Massachusetts alleging that Town officials, together with ERT and McCandless, had conspired to

deprive it of its constitutionally protected rights. Following this Court's decision in *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978) the Town was added as a party.

The District Court entered summary judgment in favor of the Respondents, other than the Town, on June 17, 1980. On November 20, 1980, the District Court entered summary judgment for the Town in response to its separately filed motion. Final judgment was entered on June 2, 1981. The District Court's decision was affirmed by the Court of Appeals for the First Circuit on May 6, 1982 on the following grounds[7]:

1. Assuming that the Respondents' actions deprived Petitioners of their rights as defined by state law, the record presented insufficient evidence to support Petitioner's claims that they had been deprived of property without due process;
2. The record presented insufficient evidence to "prove" that Regulation 3.3.1.28 (and the illegal factors it permitted the Town to consider) were the "sole or major" grounds for disapproval;
3. Petitioners had no standing to raise the First Amendment rights of homeowners in the proposed subdivision.

Petitioner's Petition for Rehearing was denied on June 15, 1982.

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[7] Both courts also made rulings disposing of Petitioner's claims under 28 U.S.C. §§ 1985 and 1986. Petitioner does not seek a writ a certiorari with respect to these rulings.

Reasons for Granting the Writ

I. A Writ Of Certiorari Is Needed To Resolve Important Issues Surrounding The Definition Of Constitutionally Protected Rights

A. *Recent Decisions of This Court Leave Unresolved the Issue of When Post-Deprivation Remedies Cure Unconstitutional Deprivations of Property*

In Board of *Regents* v. *Roth*, 408 U.S. 564, 577 (1971) this Court held that constitutionally protected property interests are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules of understandings that secure certain benefits and that support claims of entitlement to those benefits." In Massachusetts, applicants who have filed subdivision plans are entitled to local approval, provided the plans meet the reasonable rules and regulations of the town. Mass. Gen. Laws Ann. ch. 41, § 81M. Massachusetts has also enacted laws designed to prevent towns from subjecting an applicant to ex post facto rules and regulations, Mass. Gen. Laws Ann., ch. 40A, § 7A, the taking of an applicants' property without compensation as a condition for approval, Mass. Gen. Laws Ann., ch. 41, § 81Q, and the consideration of evidence against the applicant without his knowledge, whether at secret meetings, Mass. Gen. Laws Ann., ch. 39, § 23A, or through consideration of documents which have not been made available to the applicant, Mass. Gen. Laws Ann., ch. 66, § 10. Petitioners have alleged that Respondents engaged in an intentional scheme to deprive them of their rights as defined by state law and designed in such a manner as to insure the failure of state remedies. Assuming without deciding that Respondents in fact committed the numerous violations of state law alleged by Petitioners, the First Circuit ruled that

these violations did not rise to the level of violations of federally protected rights. Its rulings raise important constitutional issues which should be decided by this Court.

Recent decisions of this Court defining constitutionally protected rights leave unresolved an important issue raised by the ruling of the First Circuit. This open issue can best be illustrated by a comparison of *Parratt* v. *Taylor*, 451 U.S. 527 (1981) with *Patsy* v. *Board of Regents of State of Fla.*, ____ U.S. ____, 102 S.Ct. 2557 (1982). In *Parratt*, this Court held that the provision of post-deprivation tort remedies by the State of Nebraska satisfied constitutional due process requirements where the deprivation of property took place as a result of the negligence of state officials. It does not necessarily follow, however, that the provision of adequate post-deprivation remedies satisfies due process requirements in all instances. Justice Blackmun, in his concurring opinion in *Parratt* states: "...[I] do not understand the Court to suggest that the provision of 'post-deprivation remedies,'...within a state system would cure the unconstitutional nature of a state official's intentional act that deprives a person of property." 451 U.S. at 545.

In *Patsy*, the lower court examined the state remedies available to the Petitioner there in great detail, concluded they were adequate, and required the petitioner to exhaust these remedies prior to filing an action under § 1983. While this Court, in its opinion in *Patsy*, discussed only the question of whether exhaustion is required under § 1983, the decision also contains an implicit ruling on the issue left open in *Parratt*. If an adequate remedy under State law cures all deprivations of due process, then there would have been no need in *Patsy* (or any other case) to discuss whether Patsy was required to exhaust that adequate remedy under state law. *Patsy*, therefore, seems to present one type of case where the presence of an adequate state remedy is not sufficient.

At least one lower court has struggled to define the type of deprivation which can be cured by an adequate state remedy. In *Bonner* v. *Coughlin*, 517 F.2d 1311 (7th Cir. 1971), modified en banc, 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978) dealing with facts analogous to *Parratt* and decided prior to the *Parratt* decision, the Court suggests that there is a difference between a challenge to an established state procedure, and a property damage claim arising out of the misconduct of state officials. 517 F.2d at 1319. In *Patsy*, however, no established state procedure was challenged, suggesting that this is not the controlling distinction.

The First Circuit in its decision below, resolves the issue by applying an entirely new—and Petitioner would argue incorrect—standard. Disposing of the issue in a footnote (A. 19-20, fn.9) the First Circuit ruled that an adequate state remedy satisfied due process requirements unless the case involves "gross abuse of power, invidious discrimination or fundamentally unfair procedures." This is far more demanding than the standard suggested by Justice Blackmun in his concurring opinion in *Parratt*. A writ of certiorari is needed to resolve the conflict and clarify this important issue for the lower courts.

B. *What Standard Should Be Used to Determine the Adequacy of State Remedies to Cure Intentional Deprivations of Property*

Assuming that the First Circuit was correct in ruling that an adequate state remedy may cure intentional deprivations of property by state officials, its assessment of state remedies is cursory and totally inadequate. The lower court apparently assumes (A. 19-20, fn.9), without analysis, that the existence of a constitutional state statutory scheme for appealing from denial of a subdivision plan is automatically sufficient to remedy the intentional actions of state officials. An examination of relevant portions of the Massachusetts Subdivision Control Law, Mass. Gen. Laws Ann., ch. 41, § 81BB illustrates a

detailed, admittedly constitutional statutory scheme for appeals from decisions of local planning boards, which nevertheless is totally inadequate to remedy the particular intentional actions of the local officials in this case.

1. A § 81BB appeal is limited to the issue of whether the plan submitted complies with applicable laws, rules and regulations. The applicant cannot raise the issues included by Petitioners in this litigation: intentional scheme to deprive Petitioners of their right to approval, use of unconstitutionally vague regulation, denial on the basis of unconstitutional political and social concerns.

2. Under a § 81BB appeal, the court has no power to award compensatory money damages. Where, as here, local officials' intentional obstructions placed in the path of approval so delayed construction of the subdivision that it no longer was feasible, the right to ultimate approval of the original plan was of no use and does not serve to recompense an applicant for the real losses incurred as a result of the officials' unconstitutional acts.

3. In this particular case, Petitioners initially sought the limited state remedies which were available. Having obtained a remand from the State court, Petitioners were denied the approval to which they were entitled by Respondents, who insisted Petitioners file an entirely new plan and start the process all over again, subject to all the new regulations that had been enacted in the interim. Denied review by the state court at this juncture, and faced with the possibility that compliance with the Board's insistence on a new plan would be deemed an election to start all over again, CEI had no place to turn but to the federal courts for relief. Few state remedial schemes are adequate in the face of such a determined effort to deprive a person of his state defined rights.

The First Circuit premises its ruling that due process has been provided on the existence of a state remedial scheme without examining that scheme to determine whether it does

in fact serve to remedy the particular unconstitutional deprivations which are claimed to have occurred. A writ of certiorari should be granted in order to guide the lower courts in the type of analysis necessary to assess the adequacy of a state remedial scheme where that adequacy is relied upon to cure unconstitutional deprivations of property.

C. *Must Deprivations of Property Without Due Process Be "Egregious" In Order to Warrant Constitutional Protection?*

Aside from its cursory discussion of the availability and adequacy of state remedies, the First Circuit also appears to base its decision on the ruling that the facts in this case are simply not sufficiently "egregious" (A. 19) or out of the ordinary to warrant the attention of the federal courts. Petitioners are aware of no such additional requirements under the Constitution or the decisions of this Court. The writ should be granted in order to correct this erroneous precedent on a crucial constitutional issue.

II. The Decision Of The First Circuit Is In Direct Conflict With The Prior Decision Of This Court In *Village Of Arlington Heights* v. *Metropolitan Housing Development Corp.*

A. *In Ruling On the Motivation Behind the Written Decisions of Town Officials, the First Circuit Applies a Standard Which Directly Conflicts with a Prior Decision of This Court.*

Petitioner presented evidence below that the Board's September 26, 1974 decision was based upon Town Regulation 3.3.1.28, which required an applicant to submit an en-

vironmental and financial study showing that the proposed development was in the "best interest of the Town". The First Circuit expressly declined to decide whether this regulation was constitutionally infirm for lack of standards, ruling that "plaintiffs have not established any likelihood of showing that Regulation 3.3.1.28 played [a sole or major] role..." in the denial of the plan. (A. 16)

This ruling is in direct conflict with this Court's decision in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977) where the Court held that a plaintiff is not required "to prove the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." It is even more difficult to provide such proof in opposition to a motion for summary judgment, prior to trial and the opportunity to cross-examine. Yet this is precisely the standard applied to Petitioners by the First Circuit. A writ should be granted to correct this conflicting and erroneous ruling.

B. *The First Circuit's Ruling That Petitioners Lacked Standing to Assert First Amendment Rights Directly Conflicts With the Prior Decision of This Court*

Petitioner presented evidence below that Town officials' sustained efforts to defeat the subdivision plan were motivated by concern over the creation of "a political clique" and that "[c]ommon land ownership could foster a viable political group in a town such as Bolton." (Quoted from ERT's evaluation of Petitioner's environmental study filed in its attempt to comply with Regulation 3.3.1.28). Petitioners assert that denial of the plan for political and social reasons constitutes

a violation of the homeowners' right to free association under the First Amendment of the Constitution of the United States.

The First Circuit disposes of this issue (A. 23, fn.12) by ruling that Petitioners have no standing to raise such claims. The facts of this case fall squarely within the holding of this Court in *Village of Arlington Heights* v. *Metropolitan Housing Corp., supra*. Petitioners here include the corporation, which had invested money in the project, submitted plans to local authorities, and had its project stopped by the actions of local officials as complained of herein. In addition, Petitioner Wayne Barber has stated his intent to become a homeowner in the particular subdivision (and thereby automatically an owner with an interest in common areas, and a member of the homeowner's association). This is not a "generalized grievance...it focuses on a particular project and is not dependent on speculation about the possible actions of third parties not before the court." 429 U.S. at 264. Petitioners have thus presented evidence of the likelihood of their membership in a group which was prevented from coming into existence by the actions of Respondents. The fact that the political and social threat posed by such a group may have been only perceived, rather than actual, does not in any way lessen the impact on intended members of the group, or deprive them of standing. The writ should accordingly be granted to correct this erroneous and conflicting ruling of the First Circuit on an important recurring issue.

Conclusion

This case presents a number of issues in an important and evolving area of constitutional law, defining the boundaries between violations of constitutional rights and mere violations of state law. In an apparent effort to discourage "disgruntled developers" from filing suit in federal court, the First Circuit makes rulings which directly conflict with previous decisions

of this Court, disposes of important constitutional issues in footnotes, and overlooks evidence despite the posture of the case, on appeal from the allowance of a motion for summary judgment. Such rulings will not serve to "stem the tide" of cases filed under 28 U.S.C. § 1983. This Court's guidance is needed to set clear and non-conflicting standards defining the elements necessary to maintain a cause of action under 28 U.S.C. § 1983. For these reasons, Petitioners request that their petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 81-1476

CREATIVE ENVIRONMENTS, INC., ET AL.,

PLAINTIFFS, APPELLANTS,

v.

ROBERT ESTABROOK, ET AL.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[HON. JOHN J. MCNAUGHT, *U.S. District Judge*]

Before

CAMPBELL and BOWNES, *Circuit Judges*,
and WYZANSKI,* *Senior District Judge*.

Edward P. Leibensperger, with whom *Patricia S. Nelson*, and *Nutter, McClennen & Fish* were on brief, for appellants.

J. Christopher Robinson, with whom *Edward R. Lev, Thomas M. Zimmer*, and *Sullivan & Worcester* were on brief, for appellees Environmental Research and Technology, Inc. and Scott McCandless.

Joan A. Lukey, with whom *J. Owen Todd, Jane D. Kaplan*, and *Hale and Dorr* were on brief, for appellees Robert R. Estabrook, et al.

May 6, 1982

CAMPBELL, *Circuit Judge*. Creative Environments, Inc. ("CEI") and its president, Wayne E. Barber, appeal from the granting of summary judgment in favor of defendants Town of Bolton, Massachusetts, certain town officials, Environmental Research & Technology, Inc. ("ERT"), and Scott McCandless, an employee of ERT and a Bolton resident. CEI had sued all defendants except the town on February 5, 1976, charging a conspiracy to deny CEI its constitutional rights in connection with the Bolton Planning Board's rejection of a residential housing development pro-

* Of the District of Massachusetts, sitting by designation.

moted by Barber and CEI. As later amended, the complaint alleged violations of 42 U.S.C. §§ 1983, 1985(3), and 1986 and sought declaratory and injunctive relief as well as compensatory and punitive damages against all defendants. The Town of Bolton was added as a defendant in 1978.

After four years of discovery, the defendant officials, ERT, and McCandless moved for summary judgment. When considering the motion, the district court had before it affidavits, answers to interrogatories, and extensive depositions. It allowed the motion on June 17, 1980. On June 18, the Town of Bolton similarly moved for summary judgment. This motion was allowed on November 20, 1980 and final judgment was entered on June 2, 1981. This appeal followed. We agree with the district court that there was no triable issue and that movants were entitled to judgment as a matter of law.

I.

We set forth the facts of record at considerable length, taking pains to include in our narration those which tend to favor plaintiffs' claims.

CEI was incorporated by Wayne Barber in March 1971 for the purpose of constructing and developing residential housing. Prior to 1973 CEI had engaged in only limited development work, its primary project having been a 24-unit condominium in Walpole, Massachusetts. In February 1973, Barber became interested in a piece of property in the Town of Bolton known as Appleton Ridge. Bolton is a small town in central Massachusetts which, according to census data, had a 1980 population of some 2,530 persons. After making preliminary inquiries and acquainting himself with Bolton's zoning bylaws and the town's rules and regulations governing the subdivision of land, Barber purchased, in October 1973, some 183 acres for $177,000. Though CEI had never developed any subdivisions before, Barber's plan was to build an 80-unit housing subdivision composed of three and

four home "clusters." Each cluster of houses was, according to Barber's plan, to be surrounded by a large area of open space,[1] and each cluster would share common services such as water and sewer. The land surrounding a cluster was to be left in its natural wooded state. The cluster configuration was an important part of Barber's concept for the subdivision. To satisfy the Bolton zoning requirement that individual single family homes be built on separate lots of at least 1.5 acres, Barber drew the lot lines around each home within a cluster in an unconventional, irregular shape. These lots preserved Barber's preference for having homes within a cluster close together and complied with at least the letter of the zoning rule, which had no express sideline specifications in addition to its requirement that each individual home have 1.5 acres surrounding it. Barber also hoped to provide common facilities such as a pool and community building for the use of the entire subdivision. He intended that each homeowner would own, in addition to his house, an interest in these facilities, and that owners would automatically become members of an association which would govern the use and maintenance of these common areas.

On December 4, 1973, in accordance with Massachusetts subdivision laws, Mass. G.L. c. 41, § 81S, CEI filed a preliminary plan for the Appleton Ridge subdivision with the Bolton Planning Board.[2] On February 1, 1974, the Board

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[1] Only 84 of the 90 homes were to be built on land within the Bolton town limits. The other six were to be built on areas in Appleton Ridge which fell within the boundaries of the neighboring town of Stow. The issues in this case are related only to the 84 homes — to be built in 21 clusters — within the Town of Bolton.

[2] The Planning Board at this time was made up of Robert R. Estabrook (Chairman), Thomas Murphy, Berneda A. Serfass, and Bordon E. Slater. These officials — with the exception of Thomas Murphy, who died during the course of the litigation — are all defendants in the present action. Other named town officials who are defendants in this case include Planning Board members Fischer and Kelley, Town Counsel Hill, the Board of Selectmen, the town's Law Committee, and the seven members of the Conservation Commission.

disapproved this plan by unanimous vote. As reasons for disapproval, the Board noted that the plan provided for at least six dead-end streets which had not, as was required by the town bylaws, been previously approved by the Planning Board. The Board also stated that several lots lay across an approved town way "for which no legal abandonment has been approved nor has any relocation been approved." Several roads were found to have grades in excess of the allowed maximum of six percent, with insufficient "leveling areas," and the irregular lots were found to be "not in compliance with the intent of the town by-laws." The Board attached a report from the Bolton Board of Health, which also disapproved the plan, and noted that insufficient data on such matters as water holes, recreation areas, open space, utilities and street designs had been provided. Finally, the Board noted that no financial arrangements or conditions had been presented or discussed.

Barber took no exception to this disapproval but rather set about the task of preparing a "definitive plan" for the Appleton Ridge subdivision. Under Massachusetts law, the Board would be required to approve such a definitive plan so long as it complied with Bolton's zoning laws and the Board's own "reasonable" rules and regulations. Mass. G.L. c. 41, § 81M. One such Board regulation, which was in effect at the time Barber purchased Appleton Ridge, stated that, as a condition of approval, land developers were to file with the Planning Board "Environmental and Financial Impact Studies endorsed by a professional Planning Engineer which demonstrates that all available alternatives have been explored and evidence is provided that the plans submitted represent the best interest of the Town." Board Regulation 3.3.1.28. No standards or criteria were provided in the regulation, or elsewhere, as to how this condition might be satisfied. Moreover, there was apparently some dispute among Board members and citizens regarding the rule's validity under state law. Scott McCandless, in particular, believed that the regulation was not valid.

Nevertheless, on March 11, 1974, in an attempt to comply with this requirement, CEI submitted to the Board a 33-page study prepared by Charles E. Downe Associates entitled, "Response to Section 3.3.1.28 of The Bolton Subdivision Regulations." CEI heard nothing from the Board regarding this submission, however, and on July 30 CEI filed its full "definitive plan" with the Planning Board.

Unlike its preliminary plan, the definitive plan did not show lines breaking up each cluster into irregular lots. Rather, in an effort to defuse the 1.5 acre zoning issue, CEI designed the new plan to show only five large parcels divided by the proposed public ways. It was apparently understood by both Barber and the Board that, once the entire subdivision concept was approved, CEI would submit for Board approval individual plans for each house in accordance with a special provision of the subdivision laws. *See* Mass. G.L. c. 41, § 81P.

On August 27, 1974, the Planning Board met with CEI to discuss Appleton Ridge in detail. After CEI had finished its presentation and had departed, the Board drafted a letter, which it sent the following day, to all the major town boards and officials informing them of the CEI proposal. In this letter the Board informed these officials that a meeting was being scheduled at Town Hall for September 7 "for a review of the Creative Environments, Inc. definitive subdivision plan." It further noted that a public hearing would be held on September 9 to formally discuss the plan and that all recommendations had to be in the Planning Board's hands by the 14th. The letter closed by saying, "It is imperative that the Town Boards get together this September 7 to study, discuss and fully understand the impact that this definitive plan will have on the Town of Bolton." No copy of this letter was sent to Barber or CEI, and no representative was present at the September 7 meeting. Indeed, when Barber asked a Board member on September 5 when the next Planning Board meeting would be held, he was told only that it would meet on the 9th for the public hearing. Both the September 7 meeting

of town leaders and September 9 public hearing took place as scheduled.

A few days after the public hearing, on September 12, at least in part because the Board intended at that time to rely upon CEI's environmental report in reaching its decision on the subdivision, the Planning Board commissioned ERT to evaluate the CEI study. Board member Murphy originally approached Scott McCandless to assist in this evaluation. McCandless was a town resident, an urban affairs specialist for ERT and a part-time reporter who covered the Planning Board for a local newsletter called the "Bolton Citizen's News." McCandless declined Murphy's invitation, however, because he had been covering the subdivision story as a reporter and felt it might be improper for him to get directly involved. McCandless referred Murphy to ERT, his employer, however, even though he had long personally felt (and had so expressed himself to the Board) that the environmental study regulation was an *ultra vires* exercise of Board power under state law. Ultimately, despite his initial reluctance to get involved in the evaluation, McCandless briefed ERT on the subdivision plan once ERT agreed to perform the work. Indeed, at least one ERT employee who worked on the evaluation assumed that McCandless was heading up the project for ERT.

Toward the end of September, several relevant events took place in rapid succession. On September 21, ERT mailed to the Planning Board its essentially negative review of CEI's environmental study. Included in this review was ERT's view that "[c]ommon land ownership could foster a viable political group in a town such as Bolton[]" and that the social and political effect of the subdivision would be "significant." This review was apparently received by September 23 because Board member Murphy, at a meeting with CEI on that day, referred to an evaluation in his possession, though he said he had not read it and would not provide CEI with a copy. Also on September 23, Town Counsel Hill wrote to the Board, and

in the context of a full critique of the CEI plan, suggested that the environmental study regulation was a valid ground upon which to approve or disapprove the plan. He altered this opinion the very next day in another letter, however, and specifically advised the Board on the 24th *not* to rely upon the CEI environmental study in its final decision.

On September 25, 1974, the Board met, voted separately on a number of distinct issues, and drafted a nine-page letter disapproving CEI's definitive plan. In this letter the Board listed seven separate reasons for its disapproval. These included 1) that the plan's proposed one-million gallon reservoir and dam were not detailed with sufficient specificity to insure public safety; 2) that the dam had not been approved by the Commissioner of Public Works; 3) that "the developer has not presented the Board with easement information as required under regulation 3.3.1.27"; 4) that Road G, a main access road for the subdivision, extended for nearly 1,000 feet into an area zoned for industrial use, in violation of regulation 2.3.11.1; 5) that the plan lacked detailed information on the control of groundwater; 6) that the plan lacked sufficient construction details in nine enumerated categories; and 7) that eight specific areas "are inadequately shown/described on the drawings and require further clarification." After each of these reasons, which were voted on separately at the Board meeting when the plan was disapproved, the Board recited that "for these reasons the Board has voted to disapprove the plan and does so disapprove." The issue of the CEI environmental study was raised at the beginning of the meeting but, according to the minutes of that meeting, "no action" was taken on a suggestion to disapprove the plan because of the study's inadequacy. At the end of the meeting, however, the Board voted to include a final paragraph in the letter which was not accompanied by the "disapproval" recital. This paragraph reads as follows:

> The Environmental Plan AR-59 which uses data that is not current draws subjective conclusion [sic] with a

> method that is questionable, and was written for a previously submitted preliminary plan, not the filed definitive plan. The Board considers this document unacceptable.

Following this rejection, on October 16, CEI filed a timely state court action pursuant to Mass. G.L. c. 41, § 81BB to obtain a review of the Board's decision.[3] In its state court complaint, CEI apparently asserted that the Board had illegally relied upon the environmental study requirement in rejecting its plan. In reply, the Board denied that "it exceeded its authority and denies it was in error as a matter of law and fact for the reasons given, *i.e.*, the environmental plan document is unacceptable and further answers by reference to its decision. . . ." Soon after this suit was filed, the town held hearings and approved, on November 26, 1974, a new zoning bylaw which prohibited the types of irregular lots contained in CEI's preliminary plan.[4] At Planning Board meetings on January 27 and 29, 1975, it was suggested by Board member Murphy and Town Counsel Hill that this new regulation might be applied to CEI's plan, but no such action was ever taken by the Board.

The state court proceeding, with the express agreement of CEI, ultimately bypassed the matter of the environmental study and focused upon a single issue relating to the preservation of open space in the development. This issue had been the subject of a series of separate, but simultaneous developments in the spring and summer of 1974.

As part of its effort to comply with Bolton's subdivision rules, CEI engaged in discussions with the town Conserva-

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[3] In the normal course, the state subdivision law prohibits a town from applying any new zoning ordinances or bylaws to a subdivision plan once a preliminary plan is filed. The filing of a state suit appealing a disapproval of a definitive plan preserves these rights and stays the application of any new ordinances "pending an order or decree of a court of final jurisdiction." Mass. G.L. c. 40A, § 7A.

[4] Because of CEI's state lawsuit, this new bylaw could apparently not be applied to CEI's plan until after an order or decree by a state court pursuant to Mass. G.L. c. 40A, § 7A. *See* note 3, *supra*.

tion Commission over the issue of open space in Appleton Ridge. Planning Board Regulation 4.4 required that "before approval of a plan," the Commission had to approve an open space provision which "unless otherwise specifically approved by the Planning Board," reserved at least ten percent of the subdivision for park and playground use. Such a requirement is authorized under Mass. G.L. c. 41, § 81U. The Commission had advised the Board in January 1974 to disapprove CEI's preliminary plan for lack of compliance with Regulation 4.4. On July 23, 1974, Barber met with Robert Held, chairman of the Commission. Held expressed dissatisfaction with the limited scope of Regulation 4.4 and requested that Barber increase the amount of open space reserved for parks. He further asked that CEI grant this open space to the town in perpetuity and at no cost to Bolton. Although such a requirement, had it been unilaterally imposed by the Planning Board as a condition for approval, would apparently have violated state law, *see* Mass. G.L. c. 41, § 81Q,[5] the subdivision laws do not expressly proscribe the type of voluntary negotiations which Held entered into on behalf of the Conservation Commission. Barber replied that he would "not object to the [additional] Conservation Commission requirements provided that the definitive plan was approved by the Planning Board substantially as submitted on July 30, 1974 with the waivers requested therein." Held said that neither he nor the Commission could control the decision of the Board, but he suggested that CEI and the Commission enter a side agreement contingent upon favorable Board action. Barber agreed and Held drafted a letter of agreement. This arrangement was finally consummated in a letter of intent sent by Barber on September 13.

[5] Mass. G.L. c. 41, § 81Q provides that "No rule or regulation shall require, and no Planning Board shall impose, as a condition for the approval of a plan of a subdivision, that any of the land within said subdivision be dedicated to the public use . . . without just compensation to the owner thereof."

This letter stated that "Whereas the Bolton Conservation Commission ... desires an Open Space Plan with requirements other than those required under Regulation 4.4 ... and whereas Creative Environments, Inc. ... agrees in principle to comply with these additional requirements ...," CEI would grant some 38 acres of open space to the Commission in perpetuity for nominal consideration provided the definitive plan is "approved substantially in the form submitted...." The Commission approved CEI's open space plan on September 17. While the Board was informed of the negotiations between CEI and the Commission, its disapproval of the definitive plan on September 26 made no mention of the open space issue. Nor did the plan itself designate any open space as being transferred to the Commission. In a revised plan submitted on December 5, 1974, however, CEI included a revised open space drawing which reflected the side agreement and labelled the designated areas as reserved to the Commission.

On January 30, 1975, the Board voted to accept the December 5 plan, including the open space proposal, subject to several conditions. It voted to reject, however, several very important waiver requests which were understood by Barber to have been in the plan from the outset. Because of the Board's failure to enact the plan as submitted on December 5, specifically its failure to grant a waiver respecting road "G," CEI decided to withdraw its offer to grant the open space in perpetuity — and instead reduced the terms of the grant to three years, the maximum term which the Board could unilaterally demand under state law. Mass. G.L. c. 41, § 81Q. CEI formalized this change in its proposal on February 17, 1975, in a letter to the Board. CEI submitted a revised open space drawing on March 10. At a March 10 Planning Board meeting, member Murphy again indicated his displeasure with CEI's refusal to comply with the new lot line regulations, but on March 11 Town Counsel Hill wrote to the Board that the regulation could not be applied to CEI's plan.

On March 20, 1975, after discussions among the Board, Conservation Commission chairman Held, and members of the "Law Committee," the Board again approved the CEI plan but added the express condition that CEI include in its plan the full land grant "[a]s offered by the developer in his letter of intent. . . ." The Board also expressed the desire, although this was expressly captioned as "not a condition for approval," that CEI comply with the November 26, 1974 zoning ordinance forbidding irregular lots.

CEI immediately brought the March 20 approval conditions to the attention of the state court where its appeal was filed, and on April 10 and 11, 1975, CEI's state court proceeding went to trial with the sole issue being whether the town's March 20 insistence on the open space issue was legal under the state subdivision law. On April 22, the Massachusetts superior court issued findings and an order. As part of its ruling, the court stated,

> I FIND that the plaintiff and defendants have both conducted extensive negotiations and meetings from the inception of the application in October of 1974. The plaintiff has modified and revised various portions of their original plan of July 1974 pursuant to the Board's September disapproval. The modified plan submitted by the plaintiff in December increased the open area acreage from 19 acres to 38 acres. This modified plan was conditionally approved by the Board in January of 1975. However, the plaintiff's attempt to satisfy the conditional approval resulted in a substantial modification of the use and distribution of the open space which had been conditionally approved by the Board. Therefore, at this point, there is no way to determine what amount of land the plaintiff is willing to designate as open space without the submission of a new plan, not a revised original.
>
> Accordingly, this matter is ordered remanded to the Planning Board for definitive action. The plaintiff

> should submit a plan designating what acreage is to be open space pursuant to G.L. Ch. 41, Sections 81K - 81GG. Thereafter, the Planning Board should either approve or disapprove of this plan pursuant to the applicable sections of G.L. Ch. 41.

Soon after the case was remanded it became apparent that it was susceptible to two rather different interpretations. While CEI read the order as requiring only a new "open space" plan, it learned that the Board might interpret the opinion as requiring an entirely new *subdivision* plan, "not a revised original." This, in turn, would arguably subject CEI to the new zoning bylaw outlawing irregular lots and defeat the "cluster" concept. CEI, therefore, filed, on April 29, a motion for a new trial in which it argued that "[t]he submission of a new subdivision plan by the Plaintiff will cause the Plaintiff irreparable harm, financial and otherwise, as a result of the attendant time delays and will require the Plaintiff to conform its new subdivision plan to zoning and Planning Board rule and regulation changes which have occurred in the interim. . . ." This motion was argued on May 8 to the trial judge and denied on June 24, 1975, *nunc pro tunc* as of May 8, 1975.

Soon thereafter, CEI submitted to both the court and the Board on May 14, 1975, copies of previously submitted open space plans with revisions marked in red which were unaccompanied by "a new subdivision plan." In response, the assistant clerk of the state court wrote CEI on May 16 that the case had been remanded to the Board and that the court "did not retain jurisdiction." On June 17, after meeting in executive session several times, the Board sent a "resolution" to CEI indicating that it was requiring, as per court order, "a new subdivision plan (linen and eight prints) not a revised print or revised original. . . ." CEI never complied with this request. Instead, on June 27, CEI filed a motion for contempt in state court alleging that this latest Board action was in defiance of the court's decision. On July 22, plaintiffs filed a

notice of appeal with the state court seeking review of both the April 22 decision and the June 24 denial of a new trial.[6] In early August CEI's counsel inquired about his contempt motion with a clerk of the court where the state trial judge was sitting. That clerk informed counsel that the trial judge had stated "he was finished with the CEI case and that he would not hear any further motions with respect to the case." On October 21, CEI moved to withdraw its state court appeal. This motion was granted. On February 3, 1976, CEI and Barber filed the present district court action alleging violations of 42 U.S.C. §§ 1983, 1985(3) and 1986.[7]

II.

CEI and Barber contend in the present action that defendants denied them a fair hearing, measured the CEI plan against unconstitutionally vague and subjective standards, and generally "distorted" the Massachusetts subdivision laws in order to block the Appleton Ridge development. Plaintiffs say that under state law a developer whose plan comports with a town's *reasonable* regulations and bylaws is entitled as of right to Planning Board approval. Mass. G.L.

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[6] While it is uncertain whether the state court's order remanding the case to the Planning Board would have constituted a "final judgment" under applicable state law, *see* Mass. R. Civ. P. 54(a) (requiring final adjudication of rights of the parties), the order denying the new trial might have been appealable and subject to review for abuse of discretion or error of law provided the ground for granting the new trial arose for the first time on the motion. *See Moran* v. *Pieroni*, 326 Mass. 516, 95 N.E.2d 296 (1950).

[7] Between the time CEI withdrew its state court appeal and filed its federal action, the Planning Board adopted a new regulation raising the filing fee for subdivision plans. CEI would be adversely affected by this regulation if forced to submit an entirely new subdivision plan — indeed its original $75 fee would be increased to some $19,856 — but CEI does not here separately challenge the regulation. It does assert, however, that the size of the fee — which was set to help the town defray its costs in processing plans — is further proof that the town intended to enforce its environmental study regulations.

c. 41, § 81M. Here, they contend, their plan was disapproved for such improper reasons as that town officials feared its social effects upon the community and the political threat posed by the proposed homeowners' association. The town officials' asserted failure to deal "objectively" with the plan is said to have amounted to a deprivation under color of state law of rights secured by the Constitution, to wit, the right not to be denied property without due process, and thus to have violated 42 U.S.C. § 1983. Plaintiffs also contend that defendants conspired to discriminate against CEI in violation of 42 U.S.C. §§ 1985(3) and 1986, this conspiracy resulting from an invidious, class-based animus against those people who might someday belong to the homeowners' association.

Section 1983

In considering whether CEI and Barber, who oppose summary judgment, have demonstrated a genuine issue of material fact, we look at the affidavits, depositions and other supporting papers in the light most favorable to them, *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 473 (1962); *Gual Morales* v. *Hernandez Vega*, 579 F.2d 677 (1st Cir. 1978), making all legitimate inferences in their favor. *Ferguson* v. *Omnimedia, Inc.*, 469 F.2d 194, 198 (1st Cir. 1972). We shall assume that CEI and Barber could have established at trial that the town engaged in adversarial and even arbitrary tactics with respect to the CEI plan. Especially with respect to the town's insistence that CEI submit an entirely new subdivision plan after the state court required only "a plan designating what acreage is to be open space . . . ," an inference might be warranted that the Planning Board was seeking to frustrate CEI's efforts to develop its subdivision. We further assume that plaintiffs could persuade a trier of fact that had CEI proposed a more modest plan with conventional lot lines, the path to Board approval would have been smoother. Nevertheless, we still do not

believe that plaintiffs can demonstrate that the Board's actions rose to the level of a violation of the Constitution of the United States.

First, with respect to procedural due process, the facts in the record, viewed most favorably to plaintiffs, do not show that CEI was denied, as plaintiffs insist, "its right to a fair and meaningful hearing process." CEI was allowed a full public hearing on the plan. In addition, the Board met with CEI on at least 11 occasions prior to the September 26 disapproval and nine additional times after that date. Each official action by the Board was accompanied by a full statement of reasons. CEI had and exercised its right to state court review of one of the Board's actions. Additional judicial review in the Massachusetts courts would seemingly have been available had CEI so elected. CEI points to the fact that it was not invited to seven meetings of town officials — including several Planning Board executive sessions — over the period from August 1974 to July 1975. The special meeting of town leaders on September 7 just prior to the September 9 public hearing is of particular concern to CEI. But the due process clause does not require that CEI be invited to attend such meetings. Administrative and governmental bodies are not constitutionally required to forego executive sessions. Nor are members of such organizations forbidden by due process from speaking periodically to one another and other leaders regarding the matters pending before them. Some 21 meetings, including a full public hearing and a state court appeal, were accorded the plaintiffs. CEI and Barber received at least the minimal process due them under the Constitution. *Matthews* v. *Eldridge*, 424 U.S. 319 (1976). To hold that more or better hearings were required would be to place an unreasonable burden on the town.

Plaintiffs would also have us find a denial of due process in the disapproval of their plan for noncompliance with what are said to be vague and unclear standards. They contend that Board Regulation 3.3.1.28, which required developers to

submit an environmental plan showing that a proposed development was in the "best interests of the town," placed "virtually unfettered discretion" in the hands of public officials. *See White* v. *Roughton*, 530 F.2d 750, 754 (7th Cir. 1976). Assuming without deciding, however, that an issue of constitutional dimension would be raised were such a regulation to be the sole, or at least a major, basis for denying an application such as this one, plaintiffs have not established any likelihood of showing that Regulation 3.3.1.28 played any such key role. Plaintiffs are entitled to all inferences which are fairly supported by the evidence, but are not permitted to build their case on mere "opprobrious epithets" of malice, *see Snowden* v. *Hughes*, 321 U.S. 1, 10 (1943), or "the gossamer threads of whimsey, speculation and conjecture." *White* v. *The Hearst Corp.*, 669 F.2d 14, 19 (1st Cir. 1982), *quoting Manganaro* v. *Delaval Separator Co.*, 309 F.2d 389, 393 (1st Cir. 1962). CEI has pointed to little beyond its speculations to show that the challenged regulation was critical to disapproval of CEI's plan.

The Board letter rejecting the preliminary plan makes no mention of the challenged regulation. The September 26 disapproval of the definitive plan lists seven precise grounds of disapproval, each one of which is followed by the statement "for these reasons the Board has voted to disapprove and does so disapprove." The last two sentences of the Board's letter to CEI mentions the proffered environmental study and describes it as "unacceptable," but these sentences were included only after the Board had expressly voted to take "no action" on a proposal to cite the CEI study as a reason for disapproving the plan. There is thus no suggestion, express or even implied, that this regulation was the reason the Board turned CEI's plan down in September.[8] Moreover,

[8] Plaintiffs refer us to a number of statements in the record, such as the Board's answer to CEI's complaint in the state court proceeding and various statements by Board members, which are claimed to be admissions on the part of various defendants that this

CEI does not dispute the fact that the Board asserted at least several perfectly valid grounds in its September letter for disapproving the plan in addition to its mention of the CEI

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regulation played a central role in the denial of CEI's September submission. We have examined these and find that they reflect, at most, a running disagreement among various Board members concerning the validity of the regulation. There is no evidence that that regulation was actually dispositive to the Board's decision, while such evidence as there is supports the view that the Board expressly decided *not* to condition their approval or disapproval of the plan on CEI's study on several occasions.

The closest plaintiffs come to raising an issue of fact on the question is a cryptic answer by Planning Board member Fischer to a rather involved question put to him by CEI's counsel during a 1975 deposition. This exchange was as follows:

> Q ... So I say if I comply with the zoning by-law as to use, as to side lines, setback area requirements, if I comply with all other known regulations in the Town of Bolton, what more must I do in order to comply with 3.3.128 [sic] under your regulation?
>
> A As I understand 3.3.128 [sic], it requests an impact study, an impact study that identifies alternatives for the use of that property or land or that which is to be impacted, and to indicate I would hope an objective comparison with respect to the relative value of each one of these alternatives.
>
> Q And once he's done that, has he complied with the by-laws?
>
> A Yes.
>
> Q But what if your board finds that he wasn't objective but was subjective, as you said in your letter of September 26th, you would then have the right, I take it, to disapprove the plan on failing to comply with that regulation, isn't that fair to say, which you did do?
>
> A That's right.

The answers of a single Board member to the above questions — all of which suggest a hypothetical situation rather than the actual motivation of the Board in deciding on CEI's plan — is not a sufficient showing when placed beside the actual text of the rejection letter and the Board's votes to raise an issue of fact as to whether the environmental study regulation played a dispositive role in the rejection of the plan. Nor does the Board's answer to CEI's state court complaint do more than merely reference the letter and the reasons for rejection stated therein. The district court, therefore, did not err in granting summary judgment on such a record. *Cf.*

study. On January 29, 1975, the Board voted 3-2 *not* to require a new environmental study from CEI as a condition for acceptance of the approved plan, and finally, in its March 20 communication with CEI and in its June requirement of a new plan, the Board mentioned neither the regulation nor any environmental study. In these circumstances, and lacking some tangible indication that Regulation 3.3.1.28 was in fact a dispositive ground for disapproval, we think the regulation raises no issue of constitutional moment in this case. We thus affirm the district court's grant of summary judgment as to this issue.

CEI finally asserts that its right to due process was violated by the town's overall "distortion of the existing statutory and regulatory scheme." This argument rests not on any failure to have provided adequate procedures, but on the alleged arbitrary misapplication of state law resulting, plaintiffs assert, in denying them their "right" to conduct a legitimate business and make a profit. Plaintiffs again point to the Board's vague environmental study regulation, discussed *supra*, as well as to the Board's positions on the open space question, its interpretation of the state court order to require an entirely new subdivision plan (and thus to require conformance with the new squared lot bylaw), and the raising of the filing fee for subdivision plans.

It is not impossible to derive a theoretical basis for CEI's argument from cases such as *Monroe* v. *Pape*, 365 U.S. 167 (1960) and *Perry* v. *Sindermann*, 408 U.S. 593 (1972). But were such a theory to be accepted, any hope of maintaining a meaningful separation between federal and state jurisdiction in this and many other areas of law would be jettisoned. Virtually every alleged legal or procedural error of a local planning authority or zoning board of appeal could be brought to a federal court on the theory that the erroneous application of state law amounted to a taking of property without due

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Room v. *Caribe Hilton Hotel*, 659 F.2d 5, 8 (1st Cir. 1981) (more than a mere scintilla of evidence required to overcome directed verdict).

process. Neither Congress nor the courts have, to date, indicated that section 1983 should have such a reach.

As support for its position that a "distortion" of state law triggers constitutional rights, CEI relies on cases either involving procedural due process or on cases where the official conduct at issue was significantly more egregious than that alleged here. In *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), for example, cited by plaintiffs, the Supreme Court found that a nontenured state university professor whose contract was not renewed was *not* entitled to a hearing prior to termination because he had no property interest under state law. Even assuming CEI had a property right here, however, we have already found that no procedural default took place. Moreover, *Moran* v. *Bench*, 353 F.2d 193 (1st Cir. 1965), *cert. denied*, 384 U.S. 906 (1966), and *Progress Development Corp.* v. *Mitchell*, 286 F.2d 222 (7th Cir. 1961), also relied upon by CEI, are readily distinguishable. In *Moran*, this court affirmed a section 1983 summary judgment against a plaintiff who claimed to have been "arbitrarily" treated by the Massachusetts Registry of Motor Vehicles. We reached this result even though the officials in that case might have been "over-demanding." *Id.*, at 194.[9] The

[9] It is true that we stated in *Moran* that "if defendants [public officials] employed their official powers for the purpose of injuring the plaintiff, rather than to serve the proper ends of their governmental duties, plaintiff might well have a claim under the civil rights statutes." *Moran* v. *Bench*, 353 F.2d at 194. This was but general dicta, however, and even if it could here be shown that the Board members strayed wilfully from "the proper ends of their governmental duties," their digression was not of "constitutional proportions." *Crocker* v. *Hakes*, 616 F.2d 237, 239 n.2 (5th Cir. 1980) (per curiam) (rejecting section 1983 due process claim where city council voted to uphold issuance of a building permit). Where a state has provided reasonable remedies to rectify a legal error by a local administrative body (and CEI raises no challenge in this case to the constitutionality of the state subdivision scheme itself), current authority indicates that due process has been provided, and that section 1983 is not a means for litigating the correctness of the state or local administrative decision in a federal forum. *Cf. Ingraham* v. *Wright*, 430 U.S. 651 (1977) (state tort remedies adequately vindicate due process where corporal punishment administered in schools); *Parratt* v. *Taylor*, 451 U.S. 527, 542 (1981),

Mitchell case, meanwhile, involved racial animus, an equal protection fact pattern not presented in CEI's case.

Plaintiffs also cite to *Cordeco Development Corp.* v. *Santiago Vasquez*, 539 F.2d 256 (1st Cir.), *cert. denied*, 429 U.S. 978 (1976). In *Cordeco*, another equal protection case, this court affirmed a section 1983 judgment against Puerto Rican officials who, the jury found, had improperly denied the plaintiff a permit to extract sand while granting such permits to a more influential, politically connected rival. The federal basis for liability in *Cordeco*, however, was never expressly litigated, *see id.*, at 260 n.5, and the facts of that case — involving officials favoring a politically powerful, wealthy businessman with a public license over a less influential but equally deserving competitor — are significantly different from the present case. *See* note 9. Here it is merely indicated that town officials are motivated by parochial views of local

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quoting with approval Bonner v. *Coughlin*, 517 F.2d 1311, 1319 (7th Cir. 1975), *modified en banc*, 545 F.2d 565, *cert. denied*, 435 U.S. 932 (1978) (Stevens, J.) ("[T]he existence of an adequate state remedy to redress property damage inflicted by state officials avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment.").

A different situation may be presented in some instances, particularly in the realm of equal protection, involving gross abuse of power, invidious discrimination, or fundamentally unfair procedures. For example, in *Moran* we cited *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886), a case in which the Supreme Court found that a San Francisco building ordinance vesting unreviewable, arbitrary power in city officials was being enforced unconstitutionally so as to eliminate Chinese laundry operators. Different considerations may also be present where recognized fundamental constitutional rights are abridged by official action or state regulation. *See Roe* v. *Wade*, 410 U.S. 113 (1973). But the ordinary state administrative proceeding involving land use or zoning does not present such a situation, regardless of how disappointed the license or privilege seeker may feel at being initially turned down. Thus, where — as here — the state has erected a complex statutory scheme and provided for avenues of appeal to the state courts, property is not denied without due process simply because a local planning board rejects a proposed development for erroneous reasons or makes demands which arguably exceed its authority under the relevant state statutes.

interests which work against plaintiffs' plan and which may contravene state subdivision laws. Apparently no rival developer advocating CEI's ambitious plan would have had more success than Barber. Plaintiffs would thus have us rule that the due process clause to the United States Constitution was violated when Bolton's Planning Board, for the purpose of protecting what it viewed as the town's basic character, openly interpreted state subdivision laws and a state court decision in ways which frustrated plaintiffs' large-scale housing development of a particular design.

Such a claim is too typical of the run of the mill dispute between a developer and a town planning agency, regardless of CEI's characterizations of it and of defendants' alleged mental states, to rise to the level of a due process violation. The authority cited by CEI, as well as other cases, all suggest that the conventional planning dispute — at least when not tainted with fundamental procedural irregularity, racial animus, or the like — which takes place within the framework of an admittedly valid state subdivision scheme is a matter primarily of concern to the state and does not implicate the Constitution. This would be true even were planning officials to clearly violate, much less "distort" the state scheme under which they operate.[10] A federal court, after all, "should not . . . sit as a zoning board of appeals." *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 12 (1974) (Marshall, J., dissenting). *Every* appeal by a disappointed developer from an adverse ruling by a local Massachusetts planning board necessarily involves some claim that the board exceeded, abused or "distorted" its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason. It is not enough simply to give these state law claims constitutional

[10] In *Kadar Corp.* v. *Milbury*, 549 F.2d 230 (1st Cir. 1977), this court held that, at least as to a single defendant in that case, a federal cause of action might be stated in a conventional planning dispute context. That case involved review of a motion to dismiss for failure to state a claim, however, where courts are traditionally very liberal in allowing plaintiffs to at least make a showing of their evidence. *See Conley* v. *Gibson*, 355 U.S. 41 (1957). We do not construe *Kadar* as precedent for the bald proposition that federal due process is implicated whenever a town official withholds a permit in violation of state law.

labels such as "due process" or "equal protection" in order to raise a substantial federal question under section 1983. As has been often stated, "[t]he violation of a state statute does not automatically give rise to a violation of rights secured by the Constitution." *Crocker* v. *Hakes*, 616 F.2d 237, 239 n.2 (5th Cir. 1980) (per curiam). *See also Paul* v. *Davis*, 424 U.S. 693, 700 (1976) *quoting Screws* v. *United States*, 325 U.S. 91, 108-09 (1945) ("Violation of local law does not necessarily mean that federal rights have been invaded."); *Snowden* v. *Hughes*, 321 U.S. 1, 8 (1944) ("[N]ot every denial of a right conferred by state law involves a denial of the equal protection of the laws, even though the denial of the right to one person may operate to confer it on another."). *Cf. Fair Assessment In Real Estate Association, Inc.* v. *McNary*, 50 U.S.L.W. 4017 (Dec. 1, 1981) (no cause of action stated under section 1983 for claims related to discriminatory administration of state tax system). In short, we see nothing in the present case to distinguish it sufficiently from the usual land developer's claim under state law to warrant recognition of a federal constitutional question. CEI may quite possibly have state law claims on the facts alleged. If so, there appear to be adequate state law remedies to vindicate these claims without resort to a federal court.[11] *See Parratt* v. *Taylor*, 451 U.S.

[11] Even were we to recognize that a constitutional claim was stated on these facts, we have serious doubts that CEI would prevail on this claim. As noted previously, the environmental study regulation was never used by the Board as a ground of disapproval. The open space question, meanwhile, was the subject of a state court decision which, even if not immediately appealable, could have been called into question in a subsequent action had CEI submitted another "plan" (of some sort) which was rejected by the Board. While this option may appear to be time-consuming, we note that CEI's federal action has hardly been a speedy process. The present action was filed some six years ago. In addition, the town's new bylaw against irregular lots and the new filing fee were both passed in accordance with proper state law procedures; CEI does not seriously contest their independent validity on either substantive or procedural grounds. Finally, even were this case to

527, 542 (1981). *Cf. Kent Island Joint Venture* v. *Smith*, 452 F. Supp. 455 (D. Md. 1978) (district court abstaining in case where local officials approved allegedly "unreasonable" water and sewer rules in order to frustrate local developer).

In sum, we find to be without merit CEI's generalized claim that it was denied procedural and substantive due process in the pursuit of its subdivision plan[12] and accordingly affirm the district court's judgment as to all of plaintiffs' claims under section 1983.

Sections 1985(3) and 1986

CEI claims that, in addition to relief under section 1983, it is entitled to recover under section 1985(3)[13] and 1986[14] because the acts of various defendants were motivated by a "class-based, invidiously discriminatory animus. . . ." *Griffin*

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properly raise some type of a federal due process question, the conventional nature of the dispute and the strength of the state's interest in overseeing land use issues might lead a federal court to abstain from an adjudication of the constitutional claim. *See Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943); *Allstate Insurance Co.* v. *Sabbagh*, 603 F.2d 228 (1st Cir. 1979); *Kent Island Joint Venture* v. *Smith*, 452 F. Supp. 455 (D. Md. 1978). We note, however, that where allegations of more extraordinary, egregious behavior by public officials are present, one court has found that abstention may not always be appropriate. *Heritage Farms, Inc.* v. *Solebury Township*, No. 81-1234, slip op. (3d Cir. Feb. 10, 1982). *See generally* Note, *Land Use Regulation, the Federal Courts, and the Abstention Doctrine*, 89 Yale L.J. 1134 (1980).

[12] We need not address the merits of CEI's additional claim that it was denied a first amendment right to "freely associate" by virtue of the Board's actions. CEI has no standing to litigate such a speculative claim — based as it is on the possible future existence of a politically active homeowners' association — and we accordingly decline to address it. *Warth* v. *Seldin*, 422 U.S. 490 (1975).

[13] Section 1985(3) provides an action for any person or class of persons injured by a conspiracy organized "for the purpose of depriving, either directly or indirectly, [such persons] of the equal protecion of the laws . . . ." 42 U.S.C. § 1985(3).

[14] Section 1986 provides that anyone who knows of a conspiracy which would violate section 1985, has the power to prevent it, and fails to do so, is as liable as a conspirator. 42 U.S.C. § 1986.

v. *Breckenridge*, 403 U.S. 88, 102 (1971). The "class" of people allegedly discriminated against, according to CEI, were people who might someday belong to the Appleton Ridge homeowners' association.

We agree with the district court that these claims are without merit. In *Harrison* v. *Brooks*, 519 F.2d 1358 (1st Cir. 1975), this court explained that

> The requirement that the discrimination [in a section 1985(3) case] be "class-based" is not satisfied by an allegation that there was a conspiracy which affected the interests of a class of persons similarly situated with the plaintiffs. Rather, the complaint must allege facts showing that the defendants conspired against the plaintiffs because of their membership in a class and that the criteria defining the class were invidious.

Id., at 1360.

In the present case CEI cannot (and does not) assert that it is itself in a class with other persons who are even remotely "similarly situated," much less that CEI has itself been the victim of class-based discrimination. Rather CEI claims to sue *on behalf* of an as yet undefined group of people with unknown income, racial, political and social characteristics. The most that can be said of CEI's relation to the proposed class is that CEI will make a profit if the development and, subsequently, the association come into being. Even assuming that CEI has standing to pursue such a claim on behalf of third parties, *see Warth* v. *Seldin*, 422 U.S. 490 (1975); note 12, *supra*, CEI has failed to define any definite class which would satisfy section 1985(3)'s requirement or to show that the criteria defining the class are invidious. We thus readily affirm the district court's grant of summary judgment on this issue. With no section 1985(3) claim to support it, CEI's section 1986 claim must similarly fail.

In conclusion, we fully affirm the district court's grant of summary judgment for all the defendants on all of plaintiffs'

claims in this case.[18] CEI and Barber have simply failed to demonstrate that they have suffered the deprivation of any right protected by the federal Constitution. In the absence of such proof, summary judgment for defendants was appropriate.

Affirmed.

[18] We need not discuss in detail the separate factual patterns surrounding CEI's claims against ERT and Scott McCandless since we have found that none of CEI's substantive rights were violated by actions of any town officials. Suffice it to say that ERT was involved in the entire matter largely to the extent of a $400 contract for an evaluation of CEI's environmental plan and of tentative negotiations for further work with the town. McCandless's chief sins were that he opposed the CEI subdivision plan — a position he was entirely within his rights to take — and that he worked on the ERT review. The actions of neither of these defendants implicated any of CEI's or Barber's rights under the Constitution.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 76-453-MC
CREATIVE ENVIRONMENTS, INC., ET AL.
v.
ROBERT R. ESTABROOK, ET AL.

MEMORANDUM AND ORDER ON DEFENDANT TOWN OF BOLTON'S MOTION FOR SUMMARY JUDGMENT

NOVEMBER 20, 1980

McNAUGHT, D.J.

This action came on to be heard on the defendant Town of Bolton's (the Town) motion for summary judgment. By Memorandum and Order dated June 17, 1980, this court granted summary judgment in favor of all other defendants, including members of the Town's Conservation Commission, Law Committee, Borad of Selectmen and Planning Board, and the Town Counsel, as to the plaintiffs' claims under 42 U.S.C. §§ 1983, 1985(3) and 1986. In so doing, the court noted that a municipality is not entitled to the qualified immunity enjoyed by municipal officers, as held by the United States Supreme Court in *Owen* v. *City of Independence, Missouri*, ____ U.S. ____, 100 S.Ct. 1398 (1980). *Creative Environments, Inc.* v. *Estabrook*, 491 F. Supp. 547, 551 (D. Mass. 1980).

The plaintiffs Creative Environments, Inc. (CEI) and Wayne E. Barber (Barber), who owned and sought to develop property in the Town, allege that the Town, through the official acts of its highest policymakers, deprived plaintiffs of their civil rights in violation of 42 U.S.C. §§ 1983, 1985(3)

and 1986. In substance, they claim that the Town's officials conspired with others to distort and subvert the state statutory scheme and their own rules and regulations, and otherwise acted to deprive plaintiffs of their property rights, procedural due process, and equal protection of the laws, and right to freedom of association from the time CEI first applied for subdivision approval until and during the time when the Town, on June 16, 1975, decided to require CEI to submit another subdivision plan.

I incorporate the undisputed facts recited in my Memorandum of June 17, 1980, under title of "BACKGROUND", pages 2 through 5, in this Memorandum by reference.

Section 1983, Conspiracy Claim

A review of the materials submitted by the parties in connection with the present matter and with the individual defendants' earlier summary judgment motions shows nothing which would warrant a direct or inferential finding of an agreement, express of implied, among and between town officials, or any private party to deprive the plaintiffs of their right to develop their property as contemplated, to thwart their ambitions, or to reject their subdivision application without providing procedural due process. Consistent with my conclusion on this issue in the June 17, 1980 Memorandum, I find that there is an absence of proof sufficient to require a trial on this aspect of the plaintiffs' case against the Town.

Other Section 1983 Claims

In view of the plaintiffs' other allegations, the court must consider whether, apart from any conspiracy, there is a genuine issue of material fact as to whether the Town's actions deprived the plaintiffs of their constitutional rights to procedural due process, equal protection of the laws, freedom from taking of their property without just compensation, and freedom of association.

The property interests protected by procedural due process extend to the ownership of real estate. *See Board of Regents* v. *Roth*, 408 U.S. 564, 571-572 (1972). It is also recognized by courts that a state or municipality may enact and enforce land use restrictions and controls as a valid exercise of the police power. *See, e.g., Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 129 (1978). A property owner is not entitled to whatever use of his property he chooses. The particular requirements of procedural due process in the area of governmental regulation and adjudication have not been defined with rigidity. Due process is a flexible concept whose basic requirement is an opportunity to be heard at a meaningful time and in a meaningful manner. *Matthews* v. *Eldridge*, 424 U.S. 319, 333 (1976).

I do not attempt to delineate the precise nature of procedural protections which are constitutionally required when a property owner or developer applies for municipal approval of a subdivision plan. It is not necessary to do so here. I conclude that in this action there are no genuine issues of fact which, if resolved in plaintiffs' favor, would establish a denial of procedural due process.

Plaintiffs point to the decision of the Supreme Court in *Goldberg* v. *Kelly*, 397 U.S. 254, 267-271 (1970). They concede that later decisions indicate that due process does not require an inflexible application of standards articulated in that case, but insist that the decision provides a starting point from which to assess the meaningfulness of the procedures afforded plaintiffs here. They say that due process requires, inter alia, a fair, meaningful hearing, timely adequate notice, notice of adverse witnesses or reports, an opportunity to present arguments and evidence, conclusions by a decision-maker including stated legal criteria and evidence, and an impartial decision containing the reasons for determination. Those criteria were enunciated in *Goldberg, supra*, which concerned welfare recipients whose payments were terminated without

the benefit of a hearing. *Goldberg*, without question, is distinguishable from the case at bar. The defendant Town highlights this distinction in its supplemental memorandum in support of its motion, as follows:

> ....This, of course, (plaintiffs' argument) ignores a crucial distinction between the plaintiffs' situation and that of the complaining parties in the *Goldberg* case: In the latter, an existing governmental entitlement was being stripped from the plaintiffs because of evidence leading the government to believe the plaintiffs were no longer entitled to the benefits at issue. ...In the instant case, the plaintiffs were seeking a governmental approval which they had not previously possessed. As a practical matter, this meant that the "evidence" upon which the governmental body (i.e., the Planning Board) was acting was primarily the plaintiffs' own submission. In addition, this meant that there were no "charges" against the plaintiffs, but rather an issue of whether the applicants' submission could satisfy governmental requirements....

Supplemental Memorandum of Town, pp. 8 and 9.

The undisputed facts are that, once the plaintiffs submitted their preliminary subdivision plan in early December, 1973, a series of written decisions emanated from the Town through its Planning Board which stated the reasons for the Board's decisions at various junctures in the decision-making process. While the Board of Selectmen's initial response of November 3, 1973 to CEI's preliminary proposal might have been insufficient in the context of procedural due process analysis, if considered alone, the Town's decisions thereafter, notably the disapproval letter of September 26, 1974, the decision of conditional approval of January 30, 1975, and additional decisions of conditional approval of March 20, 1975, in conjunction with the Town's applicable by-laws, rules and regulations, provided sufficiently detailed statements of findings and reasons, and notice to the developer as to the inadequacies of the subdivision plan.

Plaintiffs complain of "the conduct of secret meetings by Town officials" as an "egregious" action by Town officials violating plaintiffs' constitutional rights. There is no evidence to support this contention. On the contrary, the evidence indicates that throughout the pertinent time period the plaintiffs were afforded numerous opportunities to be present at meetings where they could, and did, present arguments and evidence to support their plan and to rebut or question matters considered by the Town in approving or disapproving CEI's plan and revisions.[1] It appears that, at least on 21 occasions, plaintiffs were invited to participate and be heard in the decision-making process. Plaintiffs' contention that their due process rights in this regard were violated (by not being allowed to participate in every meeting of the Town's officers at which their subdivision plan was discussed) is untenable. I cannot agree with the plaintiffs' characterization of certain meetings as "secret". There is no evidence to such an effect. The fact is that executive sessions or meetings to which CEI or Barber were not invited, were held, but there is not one evidentiary indication in the record from which it can be inferred that the lawful executive sessions were "secret meetings" which prevented plaintiffs' application from being processed in a "meaningful manner".

The plaintiffs claim that they were denied access to evidentiary materials used by the Town as a basis for judging their application. On the other hand, plaintiffs have to concede that the Town's decision letter of September 26, 1974 recounted word for word the report prepared by the Boston Survey Consultants (BSC).[2] It is not disputed that the substance of BSC's additional reports was thereafter made known to and discussed with the plaintiffs. The plaintiffs admit receipt of the

[1] Affidavits of Planning Board Members, Defendants' Summary Judgment Exhibit No. 29.

[2] Plaintiffs' Supplemental Memorandum in Opposition to Defendants' Motion for Summary Judgment, p. 10.

ERT report and one BSC report in December, 1974, so it cannot be said that they did not have the opportunity at later meetings to challenge their contents.[3] Finally, plaintiffs offer nothing by way of evidence or the promise of evidence to show that the Town in adjudicating CEI's application gathered evidence *ex parte*, and then failed to disclose it to the plaintiffs.

The plaintiffs claim a deprivation of procedural and/or substantive process by virtue of alleged arbitrary and capricious actions on the part of the Town regarding their subdivision application. They focus upon the Town's alleged unreasonable interpretation of an order of the Massachusetts Superior Court, resulting in the Planning Board's requiring CEI to submit a new subdivision plan, and the alleged unreasonable interpretation or disregard of the rules and regulations promulgated by the Town "for the purpose" of halting CEI's project. I perceive no evidentiary basis, however, from which one could infer that plaintiffs were denied procedural due process. Substantive due process analysis ordinarily applies where a statute operates in a clearly arbitrary and unreasonable manner and cannot be shown to advance any legitimate state interest. *See Ortwein* v. *Schwab*, 410 U.S. 656 (1973); *Roe* v. *Wade*, 410 U.S. 113 (1973). Assiduous search of the materials available to the court fails to provide any basis, other than conclusory accusation, for inferring that the Town's actions or policy disfavoring the cluster concept of housing were arbitrary or unreasonable, or bore no substantial relation to the public welfare. The plaintiffs were not prevented from building a subdivision. They were prevented from building a subdivision using the "cluster" development concept. Neither did the Town apply Regulation 3.3.1.28 as a ground for disapproval of plaintiffs' application.

[3] The ERT report was not employed as a ground for disapproval by the Planning Board. It was not evidence to be rebutted, nor evidence at all. Plaintiffs were not as a matter of due process entitled to have access to it.

The Town's decision of September 26, 1974 and the decisions thereafter state reasons unrelated to CEI's environmental study and the ERT report. The plaintiffs' suspicions and accusations are without any support.

Plaintiffs' allegations include a charge that the Town did not afford CEI the same treatment afforded other residential housing developers in granting waivers and approvals for housing subdivision plans. After substantial discovery on the part of all parties, these allegations remain unsupported by way of affidavit or other evidentiary materials. The Town is entitled to summary judgment on this claim.

The only "bias" which has been demonstrated here is a bias against the "cluster" concept of residential housing. In the context of a local decision to approve or disapprove a subdivision application in accordance with a locality's understanding of the intent and purposes of its regulations and applicable laws, an expression of such a policy does not result in the denial of substantive due process. In this case the plaintiffs had numerous opportunities to present their proposal in a meaningful manner.

As stated in the Memorandum of June 17, 1980, one cannot conclude that freedom of association among members of the proposed subdivisions homeowners association was violated, as such a claim is purely speculative. There are no facts presented which could conceivably substantiate the plaintiffs' claim. Consequently, summary judgment in favor of the Town is appropriate on this aspect of the plaintiffs' Section 1983 claims.

Plaintiffs charge further that the Town attempted to take a portion of CEI's property without just compensation by conditioning approval of the plan on CEI's granting the Town a portion of its land in perpetuity. The factual background surrounding this allegation is discussed in the earlier Memorandum. 491 F. Supp. at 553. Consistent with that discussion, I

conclude for the reasons set forth therein that summary judgment in favor of the Town must be allowed with respect to this claim also.

The Town is entitled to summary judgment with respect to the plaintiffs' Section 1985(3) and 1986 claims. Nothing has been presented which could support findings of conspiracy, invidious animus, or definition of an actual class. The plaintiffs' claim under Section 1986 must again fail upon rejection of the Section 1985 claims. *Hahn* v. *Sargent*, 523 F.2d 461 (1st Cir. 1975).

Summary judgment should not be, and is not, granted lightly. In the circumstances of this case, however, such judgment is appropriate. It is hereby adjudged and ordered that summary judgment be entered in favor of the Town with respect to all of the plaintiffs' claims.

s/JOHN J. MCNAUGHT
United States District Judge